In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-438

POTTAWATOMIE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 75-458

HANNAHVILLE INDIAN COMMUNITY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Indian Claims Commission and the Court of Claims erred in denying their claim for compensation based on non-exclusive possession of commonly used and occupied land.

Petitioners are two of eighteen Indian tribes or bands whose overlapping claims to the lands relin-

quished to the United States in the Treaty of Greenville of August 3, 1795, 7 Stat. 49, and prior treaties were consolidated for trial before the Indian Claims Commission.[1] A complete statement of the case is found in our Memorandum in Opposition to the petition for a writ of certiorari in a companion case, *James Strong, et al.* v. *United States,* No. 75–389.[2] The Commission awarded aboriginal title to certain lands described in the Treaty to various tribes, including an award to the Pottawatomie Tribe, which was represented by petitioner, the Prairie Band, the Citizen Band of Oklahoma, and petitioner, the Hannahville Indian Community. On interlocutory appeal, the Court of Claims affirmed, with one exception not relevant here (Strong Pet. App. A).[3] It remanded the case to the Commission for reconsideration of that issue and for a determination of the proper compensation for land regarding which aboriginal title had been recognized.

Twelve of the plaintiff tribes have previously filed a petition for a writ of certiorari to review that judgment. *Strong* v. *United States, supra,* No. 75–389. The

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[1] Three present-day bands of Pottamatomies were found authorized to sue in a representative capacity on behalf of the tribe: Petitioner, the Prairie Band, Ind. Cl. Comm. Docket No. 15–E; the Citizen Band of Oklahoma, Ind. Cl. Comm. Docket No. 338; and petitioner, the Hannahville Indian Community, Ind. Cl. Comm. Docket No. 29–C. The Citizen Band has not filed a petition.

[2] We are serving a copy of our memorandum in that case on petitioners' counsel here.

[3] The opinion of the Court of Claims and the Findings of Fact and Opinion of the Indian Claims Commission are reproduced as Appendices A and B to the petition for a writ of certiorari in No. 75–389.

Prairie Band of Pottawatomies has filed its separate petition based upon a different legal theory concerning aboriginal title. The Hannahville Indian Community[4] argues that its claims for compensation for a larger area should have been recognized because its ancestors were granted recognized title to those lands by a proclamation of the King of England in 1763 (Hannahville Pet. App. A, pp. A.1 to A.9) and the Treaty of Greeneville.

1. Petitioner, the Prairie Band, initially contends (Pottawatomie Pet. 9–10) that the Court of Claims erred in finding that the Indian tribes parties to the Greeneville Treaty have not established aboriginal title to lands in Royce Area 11, over which no one tribe maintained actual, exclusive and continuous use and occupancy "for a long time" prior to 1795. Petitioner argues that these lands were commonly owned or jointly used and occupied by the Indian tribes and that this system of land tenure constitutes a compensable interest under the Indian Claims Commission Act. As we discussed in our Memorandum in Opposition in No. 75–389, the test of aboriginal title based on exclusive possession that was employed in this litigation has been repeatedly approved, both before and after enactment of the Act.[5] The Court of Claims properly refused to redefine that concept, which has

[4] The Eastern Miami Indian Tribe, Ind. Cl. Comm. Docket No. 130, also joins in the petition in No. 75–458. For convenience, both petitioners in that case will hereafter be referred to simply as the Hannahville Indian Community.

[5] Memorandum for the United States in Opposition, No. 75–389, p. 4.

been held to meet the purposes and objectives of the Act (Strong Pet. App. A, pp. 5–6).

The court below recognized that under the exclusive possession theory, two or more tribes can establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship (Strong Pet. App. A, pp. 6–7). See *Sac & Fox Tribe of Indians of Oklahoma* v. *United States,* 315 F. 2d 896, 903 n. 11, certiorari denied, 375 U.S. 921. However, it upheld the Commission's finding that no close and intimate political and social confederacy sufficient to invoke this exception to the general rule existed among the claimant tribes (Strong Pet. App. A, p. 7). The essential factual question whether this determination was supported by substantial evidence does not warrant further review.

Aboriginal title is not an interest protected by the Fifth Amendment [6]; petitioner's right to compensation is statutory, deriving from the Indian Claims Commission Act. Most of the litigation arising under that Act has been concluded utilizing the rules applied by the Court of Claims in this case. Petitioner has advanced no compelling arguments showing why the definition of joint occupancy sufficient to demonstrate aboriginal title should now be substantially broadened.

Petitioner also contends (Pottawatomie Pet. 3) that any compensation ultimately found to be due the plaintiffs to this litigation should be divided among them in the same proportion as each band's share bore

[6] *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

to the total annuities provided under the Greenville Treaty.[7] The Indian Claims Commission never reached the question of compensation, and the Court of Claims remanded the litigation for further proceedings on that issue. Petitioner's argument is premature and not properly before the Court on interlocutory appeal.

Petitioner also contends (Pottawatomie Pet. 3) that the Court of Claims erred in finding that the Pottawatomies did not share aboriginal title to Royce Areas 21, 22 and 23 (Michigan) with two other tribes. The Commission found that since these lands were used and occupied by autonomous bands of Ottawa and Chippewa Indians prior to 1795, no single tribe, band or group possessed aboriginal title at the time of the Treaty of Greeneville (Strong Pet. App. B, pp. 33a–34a, 89a–90a). The Commission thereby implicitly concluded that there was no Pottawatomie presence in these enclaves. The Court of Claims affirmed this finding (Strong Pet. App. A, p. 20).

Petitioner further argues (Pottawatomie Pet. 6–8) that the Pottawatomies and three other tribes should have been awarded joint aboriginal title to the post of Detroit and surrounding lands ceded by the Treaty of Greeneville. The Commision found that these lands were largely occupied by non-Indians in 1795 and that none of the tribes had exclusive use or occupancy of

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[7] Petitioner's suggestion (Pottawatomie Pet. 9) that the government's negotiation of a cession treaty with the Indian tribes conclusively established their aboriginal title to the ceded lands has been consistently rejected. *E.g.*, *Red Lake, Pembina and White Earth Bands* v. *United States*, 164 Ct. Cl. 389, 393.

these areas or maintained a continuous settlement therein (Strong Pet. App. B, pp. 33a, 86a–88a). The Court of Claims affirmed this finding (Strong Pet. App. A, pp. 21–22).

In the absence of an exceptional showing of error, this Court need not consider petitioner's challenge to the sufficiency of the evidence on these points. See, *e.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. Thus, regardless of the resolution of petitioner's common ownership argument, the Commission's findings that the Pottawatomies have no interest in these lands would be controlling.

Petitioner, the Hannahville Indian Community, contends (Hannahville Pet. 3) that the Court of Claims and the Commission erred in not finding that the proclamation of the King of England dated October 7, 1763, and the Treaty of Greeneville recognized Indian title to Royce Area 11. But both the Commission and the Court of Claims considered the question of recognized title at some length (Strong Pet. App. A, pp. 8–11) and applied the correct and settled standard. As the court below stated (Strong Pet. App. A, p. 9):

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title," "reservation title," "recognized title," and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right

> to occupy permanently land and that right may be established in a variety of ways. * * * [*Miami Tribe of Oklahoma* v. *United States,* 175 F. Supp. 926, 936 (Ct. Cl.); emphasis in original.]

See *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 277–279; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86; *Minnesota* v. *Hitchcock,* 185 U.S. 373.

Petitioner argues (Hannahville Pet. 3–4) that this well-established standard was misapplied to the facts of this case because the court below did not discuss the 1763 proclamation. But in its brief before the Court of Claims, petitioner did not rely on that proclamation or discuss its implications, beyond a single statement that "White marauding in Indian territory and settlement there caused the King of England to issue a proclamation on October 2 [sic], 1763 prohibiting all white settlement west of the Alleghenies * * *."[3]

Moreover, assuming *arguendo* that a recognition of Indian title by the King of England would have been binding on the United States, the 1763 proclamation does not even approach a grant of a *permanent* right of occupancy to petitioner's predecessors. The proclamation prohibited purchase of lands outside the colonies directly from the Indians and required removal of persons already residing there. Within the areas in which settlement had been permitted, purchases of Indian lands were to be made only by the government.

In this respect, the 1763 proclamation parallels the various trade and intercourse acts that also drew

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[3] Brief filed for appellants in Ind. Cl. Comm. Docket Nos. 29–C and 130 in Appeal No. 1–74 before the Court of Claims, p. 4.

a line between Indian country and settled areas and forbade the purchase of land from the Indians.[9] No court has held that such legislation resulted in recognized title for all tribes west of the line, which would have included the entire western United States as it then existed. Compare *Tee-Hit-Ton Indians* v. *United States, supra,* 348 U.S. at 277–279.

The Court of Claims also properly concluded that the United States' acceptance of the cession at Greeneville was not a recognition of the Indians' title in the area ceded, but was, to the contrary, an attempt to achieve peace despite prior disputes concerning the land (Strong Pet. App. A, p. 11, Pet. App. B, p. 18a).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[9] See, *e.g.*, Act of May 19, 1873, 1 Stat. 469.

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